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What are Nigeria's Obligations Relative to the Equality of Men and Women under International Law and Is the 1999 Nigeria Constitution in Breach of those Obligations?

by

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within
LO-TCO
African Human Rights
and Access to Justice Programme
Case 150

September 2004

Summary :

Nigeria is bound by the UN Charter, the Convention on Elimination of Discrimination against Women and the African Charter for Human and Peoples' Rights to eliminate discrimination against women. Freedom from discrimination is a peremptory norm of international human rights law. There is inconsistency between the equality provision of the Nigerian constitution and the provisions relating to citizenship as applied to women.

"Equality needs no reason, only inequality does…"
Isaiah Berlin: Two Concepts of Liberty

Question on which opinion is sought: The core issue implicated in this case is the differential treatment of men and women under Nigerian Law. The 1999 Constitution of Nigeria allows men but not women to confer citizenship on their spouses through marriage. It also prohibits discrimination on the basis of sex, place of origin, religion or political opinion. There appears to be, on the face of it, a conflict between the anti-discrimination or equality provision and the citizenship provision. The issues for decision are 1) Does Nigeria's practice in this regard violate international human rights? 2) Is the 1999 Constitution of Nigeria at war with international human rights standards? 3) If the answer to (1) and (2) is yes, how can these problems be specifically resolved in terms of the relevant international human rights conventions to which Nigeria is party?

The answers to these questions are in three parts. Part one looks at the definition of discrimination against women and sex discrimination under international instruments to which Nigeria is party. It also includes some comparative approaches to the question from the United States, a Federal Republic like Nigeria. Part two evaluates Nigeria's own Constitution and its reports to the CEDAW Committee and assess whether the constitutional understanding of sex discrimination in the Nigerian Constitution read against the citizenship clause squares with her responsibility under international law. The final part offers some recommendations on possible challenges that could be mounted against Nigeria's practice under international law.

Part One: Discrimination against Women in International Law

There are two approaches to the definition of sex discrimination under human rights international law: the maximalist definition offered by the Convention for the Elimination of all forms of Discrimination against Women, CEDAW and the minimalist process-based definition articulated

in the other Human Rights instruments such as the International Covenant on Civil and Political Rights, ICCPR.

i. Definition of 'Discrimination against Women' under CEDAW

In CEDAW, 'discrimination against women' is defined in Article 1. That Article provides that for the purposes of the Convention:-
"[T]he term 'discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

This definition has three vital components: first, conduct or legislation can be discriminatory both in terms of its effect and as well as in terms of its purposes. Something is discriminatory in effect if it does, in fact, have discriminatory impact. It is discriminatory in terms of its purposes if in fact the legislature intended to be so. Second, under CEDAW, "discrimination against Women" is not limited to state action or other actions done under colour of law. Even private discrimination is prohibited. Thirdly, the ambit of discrimination is expanded beyond the traditional categories by the use of the phrase "or any other field." Put differently discrimination against women cannot be immunized from scrutiny under CEDAW by fact that it does not involve "political, economic, social, cultural and civil" questions.

CEDAW's all encompassing definition of "discrimination against women" may appear to set too stringent a standard. Yet this definition mirrors, in significant respects, that in Article 1 of the Convention for the Elimination of all forms of Racial Discrimination, CERD. In important respects, sex discrimination has many of the elements of racial discrimination: both are pervasive and based on immutable characteristics- the person against whom there is sex or race discrimination can do nothing about his or her race or sex and both forms of discrimination intersect and are reinforced by other forms of discrimination. Thus, for instance, discrimination against a group because of its religious beliefs intersects with discrimination against the same group on race and sex grounds. Victims of sex or race discrimination are thus doubly discriminated against precisely for this reason. Equally pernicious is the ease with which both racial and sex discrimination are privatized and removed from the realm of state action.

CEDAW's and CERD's wide definitions are thus rooted in the nature of the egregious ills they seek to prohibit.

ii. Other Definitions of Discrimination against Women under International Law

Other international human rights instruments do not contain a definition of "discrimination against women." Instead they mandate equality of treatment between men and women.

Under Article 2 of the International Covenant of Civil and Political Rights, ICCPR each state party undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status." Under Article 4, states may derogate from their obligations under the Covenant. But even then, the measures they take may "not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin." And under Article 26, the Covenant simply states that "all persons are equal before the law and are entitled without any discrimination to equal protection of the law."

Unlike CEDAW, ICCPR focuses on equality of treatment and of rights under the law. In addition, state action under-girds and is at the root of all obligations imposed by the ICCPR.
Other human rights instruments echo the approach of ICCPR. Article 3 of the International Covenant on Economic, Social and Cultural Rights, ICESCR, requires the state parties to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant."

Similarly, Article 2 of the African Charter of Human and Peoples Rights, ACHPR, guarantees to every individual "the rights and freedoms recognized and guaranteed by the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social arising, fortune, birth or other status." Under Article 18 on the family, the state must ensure that they eliminate "all forms of discrimination against women" and also "ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

Though these covenants do not, unlike CEDAW, explicitly broach the question of positive discrimination, the principles of international law as well as the practice of international tribunals suggest that one may take sex or race into account for the purposes of certain social policies. The correct view is probably as stated by the Permanent Court of International Justice, PCIJ, in the Minority Schools in Albania case.

In that case, the PCIJ said that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations." This recognises that the formal treatment of two individuals who are not similarly situated may in law amount to equality of treatment but it may not, substantively, amount to fair treatment. It would seem then that the appropriate test of acceptable differentiation centres upon what is just and reasonable or objectively and reasonably justified. In other words, taking someone's sex into account or considering other specific distinction is not always per se impermissible. It is taking someone's sex into account for arbitrary reasons or certain unjust purposes that is prohibited.

Given both the narrow and wide definitions offered in the different human rights instruments which one are we to apply in the Vayola case? The proper approach, I would argue, is to focus on the components of anti-discrimination that are universally agreed set against the responsibilities that Nigeria has under both international human rights instruments as well as under its own Constitution. To get to this point, a more detailed exploration of the applicable articles of CEDAW is necessary. It is to that analysis that I now turn.

Part 2: The Foundations of Nigeria's Obligations under International Law Relating to Questions of sex discrimination.

i. Obligations under Customary International Law: The UN Charter and the Universal Declaration of Human Rights

Nigeria became a member of the United Nations upon independence. Under Article 56 of the UN Charter it has the obligation to take action bilaterally or independently to promote, among others, "universal respect for and observance of human rights and fundamental freedoms of all without distinction as to race, sex, language or religion." This responsibility includes adherence to the rights enumerated in the Universal Declaration and elaborated in other UN sponsored covenants and declarations over the years. These responsibilities are, in turn, anchored in the fact, made clear by the Charter itself, that in the modern age how a state treats its citizens is a matter of international concern. It is therefore important to understand the precise nature of the obligations imposed on or voluntarily assumed by Nigeria under both the Charter and other international instruments.

Let us begin with the UN Charter. It provides that one of the ways of creating conditions of international peace, stability and well-being is respect for human rights. The Charter says that in order to create the condition for peaceful and friendly relations among nations...

“the United Nations shall (among other goals) promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.”

And further that the people of the United Nations “reaffirm faith in international human rights, in the dignity and worth of the human person, in the equal rights of men and women….”

The Charter itself does not itemize these fundamental rights and freedoms. It is left to the second basic document, the Universal Declaration of Human Rights to elaborate these rights. Paragraph 5 of the Universal Declaration preamble reaffirms “the faith” of the “peoples of the United Nations” in the “dignity and worth of the human person and in the equal rights of men and women…” The Charter explains why a Universal Declaration was thought necessary. It notes that “ a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge.”

The rights themselves are then elaborately set forth in the body of the Declaration. So far as applies to this case Article 2 and 16 need to be highlighted. Article 2 emphasises that “everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, language, religion, political or other opinion, national or social origin, property birth or other status.”

What precisely is the status of the Universal Declaration as a matter of international law and as a source of enforceable rights? Does it create any binding obligations for Nigeria? On the authorities, it would appear to. According to the US Court of Appeals for the Second Circuit, a U.N. Declaration is ….. "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community." Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." Indeed, several

commentators have concluded that the Universal Declaration has become, in total, a part of binding, customary international law".

The view of the Second Circuit finds some support in the earlier opinion of the Restatement (Third), Foreign Relations Law of the United States. The Restatement sets down the categories of contemporary customary international law of human rights. On gender discrimination the Restatement says:

"The United Nations Charter (Article 1(3)) and the Universal Declaration of Human Rights, (Article 2) prohibit discrimination on various grounds, including sex. Discrimination on the basis of sex in respect of recognised rights is prohibited by a number of international agreements including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and more generally by the Convention for the Elimination of all forms of Discrimination against Women… The domestic laws of a number of states, including those of the United States mandate equality for, or prohibit discrimination against, women generally or in various respects. Gender based discrimination is still practiced in many states in varying degrees but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law.

If the Second Circuit and the Restatement are right, then both the Charter and the Universal Declaration are now covered under Article 38 of the Statute of the International Court of Justice as "international custom….of a general practice accepted as law." In order to qualify as such the two instruments must enjoy "a general recognition among states" as "obligatory."

Where the conditions for custom to become binding law are satisfied, a long-standing practice passes into jus cogens or a peremptory norm of international law. On this analysis, then, the prohibition against sex discrimination is jus cogens and obligatory for Nigeria. But even if Nigeria were to contest the Restatement's argument that the Universal Declaration has now passed into international customary law, that would not conclude the matter for the purposes of this opinion. Nigeria has also signed a range of international instruments prohibiting sex discrimination. What obligations has Nigeria acquired by ratifying these covenants and treaties? We now turn to these instruments.

ii. Obligations under International Human Rights Treaties

As of 1st October, 2004 Nigeria was one of 178 countries who are state parties to CEDAW making her one of over 90% of UN members who have ratified the Convention. Nigeria signed CEDAW on the 23rd of April 1984 and ratified it on the 13th of June 1985. The Convention came into force for Nigeria on the 13th of July 1985. Unlike either Egypt and Iraq and numerous other states, Nigeria entered no reservations to CEDAW. Indeed, it has always fulfilled its reporting obligations under CEDAW from the very first. Upon coming into force of CEDAW, Nigeria submitted its first report promptly on the 13th of July 1986. It then combined its second and third reports and submitted them to the 396 and 397th UN Committee on the Elimination of all Forms of Discrimination again Women held on the 2nd of July 1998.

There is therefore nothing in the record that suggests that by 1999 when the Constitution now under challenge was made that Nigeria intended to denounce CEDAW. Indeed all its actions indicate that Nigeria had unequivocally agreed to be bound by all provisions of CEDAW. This background buttresses both my analysis of Nigeria's obligations and its own admissions in its reports of the ways in which it has failed to meet CEDAW standards.

i. Status of CEDAW vis a vis the 1999 Constitution: What are Nigeria's Obligations?

The enactment of the 1999 Constitution for the Federal Republic of Nigeria antedates the ratification of CEDAW. Nigeria made the new Constitution fully knowing of its continuing obligations under international law. There is a presumption that a state will "not legislate contrary" to its international obligations. And the proper principle of interpretation is that where an act and a treaty deal with the same subject, the court will seek to construe them so as to give effect to both without acting contrary to the wording of either.

It is arguable that in interpreting acts of Parliament, there is a presumption that where two acts of Parliament are in conflict over some subject the later in time prevails. A fortiorari, it may be said here, where there is conflict between an earlier treaty and a later statute, it must be the intention of the legislature to modify the full force of the treaty obligation in its domestic application. The balance of argument is against this interpretation. For this interpretation to be applied, the language of the later enactment, in this case the Constitution must be unambiguous. As I argue below, neither the language of the 1999 Constitution not Nigeria's continuing observance of obligations under CEDAW suggests

that the country intended to repudiate any of the provisions of the Convention.

The question whether a later enactment by a state modifies that state's international obligations arose for decision by the United States District Court for New York in the case of United States v. Palestine Liberation Organisation. Under the 1987 Anti-Terrorism Act all Palestine Liberation Organisation, PLO, offices in the United States were to be shut down. The then Attorney General interpreted this stipulation to include the office of the PLO Mission to the United Nations. Such an action would have been in breach of the United States obligations under the United Nations Headquarters' Agreement. The District Court ruled that it could not be clearly and unambiguously established that the Anti-Terrorism Act intended to violate an obligation arising under the Headquarters' Agreement.

Likewise, the 1999 Constitution must be in interpreted in a way that does not do violence to CEDAW or to the Constitution itself. At this point, I put aside this discussion in order to bring into sharper relief the precise nature of the obligations under CEDAW.

The enquiry must start with Article 2. Under this Article State Parties "condemn discrimination against women" and agree to pursue "by all appropriate means" and "without delay" means to eliminate discrimination against women and in particular to ensure that 1) their "constitutions embody equality between men and women" ; 2) they adopt "legislation prohibiting discrimination against women" ; 3) they adopt legal protection for women; 4) they refrain from engaging in discrimination 5) they outlaw private discrimination 6) they modify existing legislation and policy to attune it to CEDAW and 7) they repeal all criminal laws that "constitute discrimination against women."

Though a number of states, Bangladesh and Iraq among them, have entered reservations with regard to Article 2, the balance of opinion is that reservations to this article are incompatible with the Convention's objects and purpose within the meaning of the Vienna Convention on the Law of Treaties as well as the opinion of the International Court of Justice in the Reservations to the Genocide Convention case.

For our purposes, however, this debate does not matter as Nigeria has entered no reservations with respect to any of CEDAW's articles. So far as is pertinent to the case in issue in this opinion, the relevant obligation is in Article 16 read together with the undertaking in Article 2. Under Article 16 states undertake to ensure equality of rights between men and women

with reference to marriage and family. The states commit themselves to taking all "appropriate measures to eliminate discrimination against women in all matter relating to marriage and family relations." In particular, they are to "ensure on a basis of equality" that men and women shall have the same rights 1) "to enter into marriage" ; 2) "to freely to choose a spouse and to enter into marriage with their free and full consent" ; 3) "and responsibilities during marriage and at its dissolution" ; 4) "and responsibilities as parents, irrespective of their marital status, in matters relating to their children" ; 5) "to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights" ; 6) "and responsibilities with regard to guardianship, warship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation" 7) "personal rights as husband and wife, including the right to choose a family name, a profession and an occupation" and 8) "for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property."

The provisions of the 1999 Constitution disabling women from conferring citizenship on their non-Nigerian spouses not only violate Nigeria's undertaking in Article 2 but also violates Article 16 1(a). Collaterally, it imposes additional burdens on the women with regard to their married life. The Constitution introduces barriers to what a family can collectively do given the disability arising from the fact that a foreign spouse is not automatically a citizen. The family may face different visa requirements when they travel; different charges may be applicable to the husband for services otherwise available for free or for a modest fee for Nigerians; there may be severe restrictions on joint ownership of property. The legal capacity of a Nigerian woman married to a non-Nigerian to live a meaningful family life is radically different from the legal capacity of a similarly situated Nigerian man. This differential treatment of Nigerian women is based solely on the fact that they are women. There is no compelling state interest or policy objective claimed by Nigeria as a reason for imposing these disabilities on women. In legal terms, these additional burdens are, taken together, additional violations of the obligations imposed on Nigeria by Articles 2 and 16 of CEDAW.

My reading of CEDAW is consistent with the Nigerian Government's own reading of the Convention. In its own reports to the CEDAW Committee, Nigeria admits that section 131 -on language – and section 29 - on citizenship - are discriminatory against women. This admission means that under the Government's own reading of the anti-discrimination provisions of its own constitution and of CEDAW, the state has not fulfilled its obligations under Articles 2 and 16. Indeed, commenting on the anti-

discrimination provision in its own Constitution, Nigeria appears to lament that section 42 only "prohibits discrimination on the grounds of sex" but does not go the full distance required by CEDAW. The Report laments that this section "preserves equal status between men and women" only in relation to law but fails to extend this protection to practice or to shield women from discrimination by private actors.

As a starting point, then, it is common ground between the Women's Advocates Research and Documentation Centre, WARDC and the Nigerian Government, that the state is in breach of its CEDAW obligations. However, Nigeria's report skirts the full ramifications of its own admission.

First, it is not true that section 42 "preserves equal status between men and women" in relation to law. Men and women do not have the same legal status as relates to citizenship under the Constitution. This means either of two things. In this case the court could choose to ignore the equality of the men and women required by section 42 or it could re-interpret section 29 as requiring an equality of rights between men and women in relation to spousal rights. But equality is such a foundational constitutional principle that to ignore it drains life out of the 1999 Constitution altogether. The core issue, then, is for the court to be persuaded to judicially resolve the clear inconsistency between the equality of rights and the disabilities of women as against men to confer citizenship on their spouses.

Secondly, in its Report Nigeria seems to have over-looked an additional commitment expressly undertaken under CEDAW. State parties undertake a double commitment in Article 2 (a). One, they promise "to embody the principle of the equality of men and women in their national constitutions." Nigeria has partially done this under section 42. Two, they promise "to ensure through law and other appropriate means the practical realisation of this principle." Nigeria has not done this. The point is that once Nigeria recognised that the provisions on citizenship and language were discriminatory, Article 2(a)'s obligation to initiate changes to correct this "without delay" kicked in.

The conclusion then is two fold. First, as a matter of customary international law and under treaty voluntarily ratified by the Government without reservation, Nigeria is in breach of duty not to discriminate against women on the basis of sex. Second, as a matter of domestic law, there is internal inconsistency between the equality clause and the citizenship clause of the Nigerian Constitution. How is compliance with

CEDAW to be achieved and inconsistencies in the Constitution removed? That is the subject matter of the next part.

ii. Enforcing the Equality of Men and Women under the Nigerian Constitution: Analytical Approaches

The dilemma that will confront the Court in the Vayola case will be in two parts: On what basis and based on what materials can it decide that there is inconsistency in the Constitution of Nigeria? What is the appropriate relief once the decision is made?

The 1999 Constitution of Nigeria offers no guidance on how to resolve internal inconsistencies within it. In particular, it says nothing about smoothing the obvious conflict between the two foundational human rights principles implicated in this case: the principle under-girding citizenship rights and the equality principle. Framing the issue as a conflict between equality of citizenship rights and anti-discrimination helps to clarify the nature of inconsistency. In the standard case, the realization of equality of rights must surely entail full realization of the anti-discrimination principle. In most cases, the two principles are two sides of the same coin. There are times, to be sure, when equality of rights and anti-discrimination appear to pull in different directions, for example in affirmative action cases. But that happens for tactical considerations not for reasons of principle. Thus, a government may legitimately correct for past discrimination by allowing for compensatory but temporary unequal treatment. This benign discrimination is considered permissible in order to achieve substantive equality between two or more groups that have been unequal in the past.

Fortunately, this is not the case here. The Government cannot argue that men must have more citizenship rights than women in order to compensate them for past inequalities and discrimination. Since there is no tactical consideration for inequality in citizenship rights in Nigeria, Vayola Sears case must be decided on principle.

How the court might go about this is suggested by the United States Supreme Court decision in Frontiero v. Richardson . Though Frontiero does not bind Nigerian courts, it provides a highly persuasive framework for analyzing the issues that those courts must resolve in Vayola's case. The issue before the Supreme Court in Frontiero was, like the matter before us, the legal disparity of rights between men and women as spouses. Under Federal Law, a male member of the uniformed service could automatically claim his spouse as a dependant, thereby receiving greater quarters allowance and medical benefits. However, a woman in the

uniformed services could claim comparable benefits only if she demonstrated that her husband was, in fact, dependent on her for more than half of his support. The Court considered the matter and ruled that this differential treatment violated the equal protection portion of the due process clause of the 5th amendment to the US Constitution.

Said the Court:
"…sex like race and national origin, is an immutable characteristic determined solely by the accident of birth. [The] imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'

The Court considered that "classifications based on sex, like classifications based upon race, alienage and national origin, are inherently suspect and must, therefore, be subject to close judicial scrutiny."

In coming to this decision, the Court quoted its earlier decision, Reed v. Reed, with approval. At issue in Reed was an Idaho statute that established a hierarchy of persons entitled to administer the estate of a person who dies intestate e.g. 1) Parent 2) child 3) sibling. The statute provided further that when two or more person individuals were equally entitled to be appointed as administrators of an estate, the male applicant must be preferred to the female. Idaho justified this differentiation on the basis that it avoided conflicts where two or more persons were entitled to administer a decedent estate.

The Court voided the statute on the basis that it provided "dissimilar treatment for men and women who were similarly situated" likewise in Nigeria. The Constitution of Nigeria treats in a dissimilar fashion men and women who are similarly situated. The violation lays in the fact that though both men and women are equal, if they get married to foreigners they have unequal rights; the woman having fewer rights solely because of her sex. To sustain such a constitutional preference, so arbitrary on the face of it, the state needs a compelling reason. The presumption and starting point of judicial inquiry must surely be that men and women are equal in rights, responsibilities and opportunities. It matters not that the exception to the presumption is stated in the Constitution rather than in statute, the Court must be persuaded that the exception is based on considerations or grounds that are "reasonably justifiable in a democratic society."

In Reed, the Supreme Court thought the statute under attack particularly pernicious because it did not bear "a rational relationship to a state

objective that is sought to be advanced by [its] operation." Even though accepting that the state had a legitimate interest in minimizing conflicts that may eventually end up in probate courts, the Supreme Court had not doubt that this gender classification was "the very kind of arbitrary legislative choice forbidden by the equal protection clause."

So far as is relevant to the issue before us, the core holdings of Frontiero and Reed do not require absolute non-discrimination. Nor does CEDAW . Rather, the two cases insist that the differential treatment of men and women that serves no purpose or any legitimate state interest is void as such. Analogously, the Nigerian Government must persuade the Court that the granting to men but not to women of the right to confer citizenship by marriage somehow serves a legitimate state objective consistent with its obligations under the Constitution as well as CEDAW. Without such a showing, the disparate treatment of men and women is illegitimate as such. To paraphrase Justice Stevens in a different context, a rule that authorizes the sovereign to impose disabilities on only one of two similarly situated persons violates the essence of the requirement, implicit throughout the Constitution that the sovereign must govern impartially.

To this point, the focus has been on the obligations imposed by international human rights law. I have pointed out the Nigerian Government's view of its own Constitution vis a vis its obligations under CEDAW and highlighted the approaches that a Nigerian court might use to formulate criteria for attacking the discriminatory treatment of women under the citizenship clause. But this analysis must yet confront an important procedural issue: are there judicially available remedies that Vayola could seek in the Courts of Nigeria? It is to this issue that I now turn.

Part 3: Do Nigerian Courts have Subject Matter Jurisdiction in this Matter?

There are two possible arguments against the availability of any remedies in this case. One, it could be said that the decision whether to confer citizenship or not is a matter left by international law to the domestic jurisdiction of state parties. That would mean that Nigerian is free to decide who to confer citizenship on at its absolute discretion. The citizenship clause cannot therefore be subject to CEDAW standards. Two, it may also be contended that as a matter of Nigerian law, Nigerian Courts only have jurisdiction to enforce the municipal law and to the extent that CEDAW has not been enacted as an act of the local legislature, it cannot be an independent source of rights for citizens.

i. The Legal Question at issue is Discrimination not Citizenship

Both objections have some force but there are more compelling arguments in response.

First, let me consider the first objection. There is a misunderstanding about the nature and scope of the domestic jurisdiction of a state with regard to its treaty obligations. One influential commentator has perspicaciously remarked:
"the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their "nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations."

In short, the proper inquiry starts by establishing what matters international law has left to the domestic jurisdiction of states. This is precisely the question involved here. Put differently, the issue implicated in this opinion is not the right of Nigeria to decide who to confer citizenship on. International law has left that matter to states as part of their domestic jurisdiction. The issue here is different: why does Nigeria treat its women citizens differently from its men citizens? The point is that Nigeria does not have a duty under international law to grant its men citizens the right to confer citizenship on their non-Nigerian spouses. That is a choice that Nigeria makes as a matter of its own domestic law. However, once Nigeria decides to grant its men citizens the right to do so, it is then immediately required, as a matter of international law, to grant the same right to its women citizens.

In short, once a state decides to confer certain rights to its citizens, it cannot, in the absence of truly compelling arguments, cherry-pick which of its nationals will enjoy those rights. Thus, under international law, there is no difference between Nigeria deciding that only Fulanis can confer citizenship by marriage and it deciding, as it has done here, that only men can confer these rights. Under the UN Charter and under all the human rights conventions to which Nigeria is party, the obligation not to discriminate on the grounds of race, sex, language and status is a matter of international law. The choice for Nigeria is, put negatively, to impose the

same burdens on men that it has placed on women or, put positively, to confer the same benefits on women that it has conferred on men.

On this analysis, the objection that the decision to confer citizenship is a matter of domestic jurisdiction has no force.

ii. CEDAW may not be a Nigerian Statute but it has Legal Consequences

The second objection has more force. The traditional approach in the commonwealth regarding international law is as stated in Australian case of Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC. The court explained that provisions of international treaty to which Australia is a party do not become part of domestic Australian law unless they have been incorporated by statute into domestic law. The problem as the Court saw it is that treaties were made by the executive but legislation was made by Parliament. However, the Court would not go so far as to say that treaties ratified but not enacted into domestic law had no legal consequences. They do. According to the Court, if a local statute was ambiguous, the courts should favour the interpretation that accords with Australia's international obligations.

More important for our purposes, the Court argued that in the absence of clear evidence from Parliament or the executive, the ratification of a treaty created a legitimate expectation that the government would act in accordance with the obligations stipulated in the treaty.

A fortiori, the fact that CEDAW has not been incorporated into the domestic law of Nigeria does not render it ineffectual as against the Nigerian Government. In particular, the fact that a judge of the Supreme Court has accepted, in the case of Mojekwu v. Ejikeme, that CEDAW offers a standard to be followed opens even more room.

CEDAW may not have statutory force but it has three elements important to this opinion. First, it creates a legitimate expectation that Nigeria will treat men and women as equal in rights. Two, it provides standards that Government has undertaken to follow and by which it can be judged. The Nigerian Government's own CEDAW Reports acknowledge this. Thirdly, where Nigerian law is ambiguous or in conflict, CEDAW provisions and values can be used to resolve the conflicts and remove the ambiguities. Looking at CEDAW from this perspective robs the second objection of much of its force.

It remains to consider the specific ways in CEDAW may be used to remove the conflict in the Nigerian Constitution and to suggest practical orders that the court may make to enforce the promise of equality made both by CEDAW and by the Nigerian Constitution.

Conclusion: How will CEDAW be used and what Orders should one seek?

i. Recommendations as to the Orders to be sought before Nigerian Courts

To this point, the following conclusions can be made: 1) Nigeria is bound both under customary international law (the Charter and Universal

Declaration) to outlaw sex discrimination; 2) Nigeria has voluntarily undertaken, through CEDAW and ICCPR and the African Charter to eliminate sex discrimination both in its Constitution and in its practice; 3) Nigeria accepts in its Reports to the CEDAW Committee that its own Constitution and practices in Nigeria violate the principles of equality under CEDAW. 4) Nigeria quotes with approval the statement of the Supreme Court in Mojekwu vs. Ejikeme that CEDAW provides a standard to be followed. 5) Nigeria recognizes, though does not admit, that there is internal inconsistencies within its own Constitution as between the equality and anti-discrimination sections.
Given these conclusions, the question is how CEDAW may be made serviceable to case of Vayola Sears. To my mind, there are two possibilities.

1. Since the Constitution provides no methods for resolving internal inconsistencies, it is legitimate for the court to interpret the provisions of the Constitution in manner that a) ensures overall coherence of the Constitution and the freedom and equality values for which it stands and b) is consistent with Nigeria's on-going obligations under international law generally and under CEDAW in particular.

2. Although, CEDAW has not been re-enacted as a statute of the Nigerian Parliament, as is the practice within the British Commonwealth, it has legal consequences. Those consequences are threefold. One, CEDAW can be used to settle disputes before the court. If the dispute involves a statute and the statute does not itself provide standards by which it is to be interpreted, the court can and should formulate standards from CEDAW or from any other applicable international human rights treaty. Two, CEDAW has application in relation to legislation. When Parliament enacts new legislation on any matter, it shall legislate consistent with the Nigerian Constitution and, to the extent possible, consistent with Nigeria's continuing obligations under international human rights law. Three, it can apply to resolve inconsistencies within the Constitution or between statutes. Where there are inconsistencies between provisions of the Nigerian Constitution and or between various statutes, those conflicts may be resolved with the help of standards formulated from CEDAW or other applicable human rights instruments.

Given these conclusions, the proper remedies to seek are a combination of declaratory orders and a moratorium on the implementation of the discriminatory sections of the citizenship provisions of the Nigerian Constitution, that is to say, declarations as follows:-

1. That there is inconsistency between the equality provision of the Nigerian constitution and the provisions relating to citizenship as applied to women;

2. That in the absence of constitutional mechanisms for resolving this conflict, the Courts in Nigeria can and should use the standards and values embodied in such international instruments as the UN Charter, the Universal Declaration of Human Rights, CEDAW and other human rights instruments to which Nigeria has subscribed.

3. That on application of these standards, section 26 of the Nigerian Constitution is discriminatory in intent and effect, inconsistent with Nigeria's international obligations under CEDAW and not reasonably justifiable in a democratic society.

4. A moratorium suspending the enforcement of this discriminatory citizenship section of the Constitution and a declaration that pending its repeal, Nigerian men and women marrying non-Nigerians will be subject to the same rights and duties.

ii. Recommendations that are Applicable after Domestic Remedies are Exhausted

There is a risk, as with every case before the Judiciary, that this case could, eventually, be decided against Vayola Sears. Though such a decision would be a major setback to the rights of women in Nigeria, it should not be the end of the matter. Nigeria ratified the Optional Protocol to CEDAW in 2000. Under the Communications Procedure authorized by the Optional Protocol individuals may, upon exhausting local remedies, bring their complaints before the CEDAW Committee. Though it is still early in this litigation, suitable preparatory work should be undertaken in anticipation of a negative decision from the courts.

Likewise, under Article 60 of the African Charter, UN human rights conventions are applicable to State parties to the Charter by reference. In this regard, these Conventions can be a basis of an application to the African Commission on Human and Peoples Rights. The Charter therefore provides a second avenue, in addition to the CEDAW Committee, for further internationalisation of the Vayola case once domestic remedies are exhausted.

Dated this 13th day of September, 2004

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